

No. 13,970

United States Court of Appeals
For the Ninth Circuit

WONG GONG FAY,

Appellant,

vs.

HERBERT W. BROWNELL, JR., Attorney

General of the United States,

Appellee.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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Appeal from the United States District Court for the
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BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the court below by virtue of Section 503 of the Nationality Act of 1940 (8 U.S.C., sec. 903, 54 Stat. 1171). This appellate court has jurisdiction to review the judgment of the lower court by virtue of Public Law 72, 81st Congress, approved 24 May 1949 (28 U.S.C.A. 1291 and 1292).

STATEMENT OF THE CASE.

The appellant, Wong Gong Fay, a male aged 28 years, claims to be the natural, legitimate, and blood son of his father, Wong Hai, who is a citizen of the United States, and who was a citizen at the time of the birth of said Wong Gong Fay; that by virtue of said circumstances of birth, the appellant herein is vested with all rights and privileges of a citizen of the United States, as provided for by Section 1993 of the Revised Statutes, by descent by and through his father, Wong Hai.

The appellant was issued necessary travel documents by the American Consulate General at Hong Kong, B.C., and arrived in San Francisco, California, on the 22nd day of April, 1951, and applied before the immigration authorities for admission as an American citizen, being the legitimate, blood son of Wong Hai, an American citizen.

After a hearing, the Board of Special Inquiry held that the appellant failed to establish the fact of birth as claimed by the appellant, and therefore was not entitled to admission as a citizen of the United States.

The immigration authorities, upon examination, conceded the citizenship of Wong Hai, appellant's father, as a citizen of the United States.

The decision of the Board of Special Inquiry was appealed to the Commissioner of Immigration and Naturalization and then to the Board of Immigration Appeals. The decision was affirmed and the appel-

lant was ordered excluded and detained for deportation. He was thereafter released on bond, after filing his complaint in the court below, seeking a declaratory relief to establish his paternity and establish recognition of his citizenship.

The case came on regularly for trial and was heard by the court. The father, Wong Hai, was presented as the first witness, and the plaintiff, Wong Gong Fay, as the second witness, for the purpose of establishing the relationship of paternity. The plaintiff introduced certain documents in support of his testimony.

Counsel for the plaintiff did not examine the two witnesses for plaintiff who arrived late, and thereafter the case was submitted.

The defense did not present any witnesses in their behalf and offered no documents other than a document pertaining to the witness Wong Hai. The defendant did not offer any evidence of any nature to controvert the testimony of the plaintiff but simply attempted to impeach the evidence offered by the plaintiff or to weaken the credibility of the appellant's witnesses.

The court found for the defendant, and the appellant by way of appeal seeks to establish the fact of paternity of the appellant, and seeks a consequential declaration of his citizenship as a citizen of the United States.

STATEMENT OF POINTS ON APPEAL.

(1) The court erred in holding that Wong Gong Fay, the appellant, is not the son of Wong Hai.

(2) The court erred in holding that Wong Gong Fay is not a national and citizen of the United States.

(3) The court erred in holding that the appellant failed to sustain the burden of proof.

(4) The court erred in holding that presumption in favor of the plaintiff had been dissipated.

(5) That the findings, conclusions and judgment of the District Court are unsupported and contrary to the evidence of the record.

ARGUMENT.**STATEMENT OF THE EVIDENCE.****Testimony of Wong Hai.**

Wong Hai, as first witness and father of the plaintiff, gave evidence that he, Wong Hai, was born in the City of Yreka, California, on 26 February 1901, and is a citizen and national of the United States, residing in the City and County of San Francisco, State of California, and was issued a form 430 document for the purpose of travelling to China on the 27th day of December, 1924. Wong Hai further testified that he was married to Low Chin Gum on 2 February 1925, and that while Wong Hai was residing in China, two (2) sons were born, the issue of this marriage, and that the first son, Wong Gong Fay, was born on 15 May 1926, and that the second son

was born on 8 May 1927, after Wong Hai, the father, arrived in the United States on 15 December 1926.

Wong Hai identified certain exhibits, namely a landing statement, made upon his return to the United States, and that said document contained statements to the effect that he, Wong Hai, was the father of a son called Wong Gong Fay. Wong Hai further identified certain report cards purporting to be the school records of his son called Wong Gong Fay, and Wong Hai identified a copy of his income tax reports, which claimed an exemption for his sons called Wong Gong Fay and Wong Kai Gong.

The court, upon its own cognizance, observed the similarity of the plaintiff and Wong Hai.

Wong Hai testified that he sent money to his family and to Wong Gong Fay at all times except during the years of World War II.

Testimony of Wong Gong Fay.

Wong Gong Fay gave evidence of his birth by relating that his day of birth was told to him by his mother and that he has a mother who is called Chin Gum. Wong Gong Fay further testified that Wong Hai was his father because he was told so by his mother, and also testified that he has a brother called Kai Gong.

Other matters were testified to, such as money received from Wong Hai, school reports, the city of his dwelling, and a few other questions concerning dates of travel and places of employment.

On cross-examination the counsel for the appellee simply asked many questions concerning dates, places of travel and employment, and failed to impeach the witness Wong Gong Fay on any matter of relationship or materiality; in fact there were no discrepancies in the testimony given by Wong Gong Fay.

(1) THE COURT ERRED IN HOLDING THAT WONG GONG FAY, THE APPELLANT, IS NOT THE SON OF WONG HAI.

(2) THE COURT ERRED IN HOLDING THAT WONG GONG FAY IS NOT A NATIONAL AND CITIZEN OF THE UNITED STATES.

The gravamen of this action is one of paternity with the resulting privilege of citizenship as a consequence thereof, and further, the instant action should not suffer the label, "Chinese Immigration Case," nor be categorized in any caste of actions other than a purely civil action at law. This action should be tried and heard under the ordinary rules of trial procedure and laws of evidence which are applicable to all parties who may come within the jurisdiction of the United States Federal Courts within the State of California, and that the plaintiff in the instant case should not be subjected to artificial rules of sustaining the burden of proof, nor should the defendant enjoy a relaxation of the burden of giving evidence.

Rule 43A of the *Federal Rules of Procedure* provides:

"All evidence shall be admitted which is admissible under the Statutes of the United States

or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held.”

(3) THE COURT ERRED IN HOLDING THAT THE APPELLANT FAILED TO SUSTAIN THE BURDEN OF PROOF.

The appellant and his witness gave evidence and testimony and were required to sustain the burden of proof inasmuch as the affirmative issue was upon the appellant herein and to this extent were bound by the California Code of Civil Procedure.

California Code of Civil Procedure provides in Sec. 2061, ‘Effect of Evidence’:

“(5). That in civil cases the affirmative must be proved and when the evidence is contradictory, the decision must be made according to the preponderance of evidence.”

The court held in *Valencia v. Milliken*, 31 C.A. 533:

“In civil cases a preponderance of evidence is all that is required.”

Again it is contended by the appellant that the testimony of the witnesses produced by the appellant sustained the preponderance of evidence.

The question of “preponderance of evidence and the significance thereof” was settled by the court in *Mather v. Aggeler & Musser*, 179 C. 697:

“By a preponderance of evidence is meant such evidence as when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.”

In the instant action the appellee failed to produce any evidence of any nature, nor did the appellee produce one single witness in his own behalf, nor exhibits, except those inherent to the files of the appellant, which was in support of appellant's testimony.

The only semblance of any evidence produced in behalf of his own defense was a well-worn map of China from which geographical problems were proposed to the appellant's witness.

The court held in *De Laval Dairy Supply v. Steadman*, 6 C.A. 659, 92 P. 877:

“The defendant must establish his new matter by a preponderance of evidence.”

The transcript clearly reveals that no preponderance of evidence was given on behalf of the defendant.

The court held in *Wheeler v. Fidelity & Dep. of Maryland*, 63 F. 2d 562:

“Defendant has burden to establish affirmative defense by preponderance of evidence.”

The appellant produced several witnesses in his behalf, but only Wong Hai gave evidence, the other two (2) witnesses, having been present at all times and ready to testify, arrived at a late hour, to give

their testimony, and counsel for the appellant thereupon submitted.

California Code of Civil Procedure, Sec. 1844, provides:

“The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason.”

This was the ruling of the court in *Southern California Music Co. v. Lake*, 106 C.A. 255 also.

Here the testimony of Wong Hai was neither impeached, controverted nor discredited, although counsel for appellee made strong but unsuccessful attempts to discredit the testimony of Wong Hai.

The court took a strong view of this principle where it held in *Myles v. Russell*, 190 C. 485:

“The testimony of one witness who is entitled to credit is sufficient for the proof of any fact in a civil case, even though that testimony be uncorroborated and contradicted by the testimony of any number of other witnesses.”

It is to be noted that Wong Hai gave evidence, and this evidence should be considered not alone in respect to its credibility and the quantum thereof, but should be considered with the evidence given by the appellee, which, of course, was none. Again the rules of evidence are clear on this point.

California Code of Civil Procedure, Sec. 2061, provides in “Effect of Evidence”:

“(6) That evidence is to be estimated not only by its own intrinsic weight but also according

to the evidence which it is in the power of one side to produce and of the other to contradict.”

The court held in *Thompson Lumber v. Inter. Comm. Comm.*, 193 F. 682:

“In a civil action complainant is not bound to do more than sustain his case by a preponderance of the credible testimony.”

(4) THE COURT ERRED IN HOLDING THAT PRESUMPTION IN FAVOR OF THE PLAINTIFF HAD BEEN DISSIPATED.

We have now a position wherein a witness under oath makes a statement to the effect that a specific child is his legitimate and natural offspring. Wong Hai under oath stated that the appellant, Wong Gong Fay, was the legitimate and natural offspring, the issue of the marriage between Wong Hai and Low Chin Gum, his wife.

The California Code provides a presumption which is disputable in favor of the person having the affirmative burden of proof, where there is a question involving paternity of a child. Therefore, Wong Hai, having given evidence of the birth of his child, and having given testimony that Wong Gong Fay was his child, was entitled to rely upon the statute establishing a presumption of legitimacy of the paternal relationship between himself and his son, Wong Gong Fay, as provided by *California Code of Civil Procedure*, Sec. 1963:

“Disputable Presumptions: All other presumptions are satisfactory if uncontradicted. They are

denominated disputable presumptions and may be controverted by other evidence. The following are of that kind:

Subd. (31).

“That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.”

This was followed by the court in *Estate of Romero*, 75 C. 379:

“Children born to a married woman during her coverture are presumed to be legitimate and to be the issue of their mother and her husband.”

A presumption follows the proceeding until dissipated by the evidence produced at the hearing, and must be overcome by the party taking the negative issue.

The appellee failed to introduce or produce any evidence or testimony to overcome the presumption allowed the appellant as to the legitimacy of the offspring, Wong Gong Fay, being the legitimate son of Wong Hai.

In the *Estate of Walker*, 180 C. 478, it was held:

“An instruction that the presumption of legitimacy can be overcome only by clear and satisfactory proof is a correct statement of the law.* * *”

Wong Gong Fay bears the family name of Wong, the father's name being Wong Hai.

Again in *California Code of Civil Procedure*, Sec. 1963, subd. (25), ‘Identity of person from identity of name’, we have a presumption which the appellee

failed to dissipate, and was carried through the trial in favor of the appellant, that the appellant, Wong Gong Fay, had the same name as his father, Wong Hai, and was to be considered as assisting in establishing the question of parentage.

The court followed this reasoning in *Re Woolsey's Estate*, 128 Cal. App. 391; *McKinley Bros. v. McCanby*, 215 Cal. 229:

“It has been held that where the names were practically similar the presumption of identity was sufficient, there being no rebuttal.”

Thus far the appellant has proceeded with the burden of proof and maintained the presumption and thereby has set upon the scale a quantum of evidence that has availed the appellant of the preponderance of evidence. The general rule is stated in 32 *C.L.R.* 242 and 32 *C.J.S.* 1047:

“In ordinary civil actions a fact sufficiently proved by a preponderance of evidence, and the verdict or finding should be based on such preponderance, the requirement of a higher degree of proof being improper.”

“A bare preponderance however slight is commonly regarded as sufficient.”

The transcript reveals that the appellee has failed to introduce evidence, or to overcome or to place in equipoise the appellant's preponderance of evidence.

The rule was stated in *Stone v. Stone*, 136 F. 2d 761:

“Neither a jury nor a judge is at liberty to disregard positive testimony uncontradicted and not inherently improbable.”

The court refused to accept the testimony of Wong Gong Fay and Wong Hai, which was positive, unimpeached and uncontroverted by the appellee. The court on the contrary made its findings which were based on speculation or personal belief. The testimony of Wong Hai and Wong Gong Fay was not contradicted, as revealed by the transcript. Therefore, the court should have accepted their testimony.

The court held in *National Labor Relations Board v. Ray Smith Trans. Co.*, 193 F. 2d 142:

“Where a witness’s testimony is not contradicted, a trier of fact has no right to refuse to accept it.”

However, the finding of the court was contrary to the evidence given by the appellant.

Again this rule was enunciated in *Controller of Cal. v. Lockwood*, 193 F. 2d 169:

“Courts may not find facts from speculation, no matter how difficult or impossible it may be to produce evidence establishing the facts in dispute.”

CONCLUSION.

The appellant therefore submits that the record substantially discloses that Wong Gong Fay is the legitimate and natural son of Wong Hai, and as such is a national and a citizen of the United States, and is consequently entitled to a judgment determining the status of Wong Gong Fay as an American citizen.

The judgment of the trial court should, therefore, be reversed.

Dated, San Francisco, California,
November 9, 1953.

Respectfully submitted,

SALVATORE C. J. FUSCO,

Attorney for Appellant.